Supreme Court U.S.
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No. 01-983

In The

Supreme Court of the United States

VANESSA LEGGETT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY BY PETITIONER TO GOVERNMENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's First and Fifth Amendment challenges to a contempt order, incarcerating her for refusing to testify and provide evidence before a federal grand jury, are moot once petitioner has been released from custody but remains under real threat of being re-subpoenaed for the same evidence at trial.

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ARGUMENT

On January 4, 2002, Vanessa Leggett, a freelance journalist and author,[1] was released from the Federal Detention Center in Houston, TX. She had been incarcerated for 168 days.[2]

Ms. Leggett's confinement was terminated upon motion of her counsel and was in conjunction with the expiration of the 18 month term of the federal grand jury investigating Robert Angleton. The government responded to Ms. Leggett's request for release by declaring that:

> The United States intends to renew its request of LEGGETT to provide the previously requested material and will pursue available procedures to require LEGGETT's cooperation, if necessary. *See* January 3, 2002, United States' Response to Motion to Vacate Contempt Order and for Order of Immediate Release (Lodged with the Clerk of the United States Supreme Court).

The prosecutors' resolve to appropriate, through subpoena, Ms. Leggett's journalistic research (including her confidential sources and conversations) and her anticipated assertion of privilege, makes a second

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[1] The government inaccurately states in its brief that Ms. Leggett has only been published two times in her career as a freelance writer. Ms. Leggett has been published four times including *Newsweek, Suddenly* (a short story anthology) and now in two separate publications by the Federal Bureau of Investigations/Department of Justice in "The Diversity of Homicide" and "The Varieties of Homicide".

[2] Prior to Ms. Leggett, the longest known incarceration of a U.S. journalist was 46 days.

contempt hearing appear inevitable. There remains an "actual, ongoing controversy." Therefore, despite the termination of the underlying contempt order, this case remains ripe for federal-court adjudication under Article III of the U.S. Constitution. *See* U.S. CONST. art. III; *Deakins v. Monaghan*, 484 U.S. 193, 199 (1988).

Soon after Ms. Leggett was released from jail, the government convened a new grand jury and immediately indicted Mr. Angleton. He is currently scheduled to begin trial on June 3, 2002. The prosecution notified counsel for Ms. Leggett that she is on the government's witness list for trial and will be resubpoenaed. *See* March 20, 2002, Affidavit of Attorney George Michael DeGeurin (Lodged with the Clerk of the U.S. Supreme Court). Ms. Leggett faces a substantial threat of future incarceration based on the Fifth Circuit's analysis of both her First and Fifth Amendment privileges.

Ms. Leggett's situation merits review as it is "likely to be redressed by a favorable judicial decision" by this Court in the instant case. *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997) (quoting *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975)). Although Ms. Leggett's original order of contempt was based on a grand jury subpoena, the Fifth Circuit's analysis of a journalist's First Amendment privilege does not differentiate between grand jury and criminal trial subpoenas. *See United States v. Smith*, 135 F.3d 963 (5th Cir. 1998); *In re Grand Jury Subpoenas (Leggett)*, Slip. opin. 01-20745 (Nov. 13, 2001). The same holds true for her Fifth Amendment privilege. Ms. Leggett remains subject to the same action

occurring again and yet, due to the nature of the contempt statute, her case is "capable of repetition but evading review." *Roe v. Wade*, 410 U.S. 113, 125 (1973); *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975).

This case fits the exception to the rule against mootness which applies when two elements co-exist. First, the challenged action must be of inherently short duration, a period too brief for effective judicial review; second, the party raising the challenge must have a reasonable expectation that she will again be subjected to the same type of action. *Weinstein*, 423 U.S. at 149. Both prongs are satisfied here. First, it is well recognized that a contempt action is intrinsically limited in term, lasting no longer than 18 months. *See* 18 U.S.C. § 1826. This Court has previously held that 18 months was not enough time for complete judicial review and certainly, the five months afforded Ms. Leggett, before the termination of the grand jury, was not sufficient to consummate such a task. *See First Nat'l Bank v. Bellotti*, 435 U.S. 765, 774 (1978).

Secondly, the Fifth Circuit's admittedly "narrow view of the journalist's privilege in criminal cases" provides a reasonable basis to believe Ms. Leggett will be subjected to a second contempt action after the government re-subpoenas her either to the new grand jury or as a witness at Mr. Angleton's trial. *Leggett*, p. 6. Unlike other courts, the Fifth Circuit has limited its application of a journalist's qualified First Amendment privilege to only protection against harassment or oppression – both before the grand jury

and the criminal trial court. *Smith,* 135 F.3d at 971[3]; *Leggett,* Slip. opin. 01-20745, p. 7. The same test will assuredly result in an identical outcome for Ms. Leggett in future contempt actions, unless she can successfully avail herself of full appellate review.

Yet, the government urges the Court to find Ms. Leggett's case moot based solely on the termination of the original grand jury. They rely on three cases in support of that position and each will be addressed in turn below. First, in *Weinstein v. Bradford, supra,* a challenge to parole procedures was held to be moot where the plaintiff had completed his sentence and there was no longer any likelihood whatsoever that he would again be subjected to the challenged parole procedures. *Weinstein* can be distinguished on its facts from Ms. Leggett's case because here the government has already indicated that they will be resubpoenaing Ms. Leggett for the same evidence in their continuing prosecution of Robert Angleton. Distinguishable on the same grounds is *In re Grand Jury Proceedings (Larson),* 785 F.2d 629 (8th Cir. 1986), where the court held a civil contemnor's appeal as moot after the grand jury's investigation resulted in both an indictment and a guilty plea causing the witness to no longer have any reasonable expectation that he would be resubpoenaed to testify in the matter.

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[3] Although *Smith* dealt with the application of a journalist's First Amendment privilege against the disclosure of nonconfidential materials before a criminal trial court, the court went on to state that although it was not directly before the court, a similar claim based on confidential materials had already been rejected in *Branzburg v. Hayes,* 408 U.S. 665 (1972). 135 F.3d at 969.

Finally, in *In re Grand Jury Proceedings (Doe)*, 863 F.2d 667 (9th Cir. 1988), the court held a contemnor's appeal to be moot upon termination of the grand jury, where the witness was found to have access to an expedited review by that same court if he faced a second grand jury subpoena/contempt action in the future. The *Doe* decision is not controlling in this case because the circuit court did not address the issue in question here – whether a resubpoenaed petitioner would also receive timely judicial review by the U.S. Supreme Court where an expedited appeal is not available.

The *Doe* case also is in conflict with the Fourth Circuit's opinion in *In re Grand Jury Proceedings Thursday Special Grand Jury September Term*, 22 F.3d 342 (4th Cir. 1994), where an appeal from an order enforcing a grand jury's subpoenas was not found moot upon termination of the grand jury. In that case the court found:

> There is more than a reasonable expectation that the complaining party . . . will be subjected to the same action again. Additionally, as is apparent from the present proceedings, the life of a subpoena, measured by the duration of a grand jury session, is too short to be fully litigated prior to its expiration. Id. at 346-347.

Here, the government has not met the heavy burden that lies with the party asserting mootness requiring it to show that the challenged conduct cannot be expected to re-occur. *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167 (2000). Similarly, they have made no showing that this case will not escape full appellate review.

The government's mootness argument is unpersuasive and is additionally suspect due to its control over the grand jury itself. Specifically, it is the prosecutor who determines the date and order that witnesses will be subpoenaed. Following the government's theory, a prosecutor could thwart a contemnor's ability to reach judicial reveiw by the U.S. Supreme Court simply by subpoenaing the witness towards the middle or end of the grand jury term. The contemnor would inevitably "run out of time" before ever reaching full appellate review. This is what occurred here. Even though the federal government was fully aware of Ms. Leggett (and the evidence that she is alleged to possess) at the inception of the grand jury,[4] they chose not to subpoena her until its near termination. Despite her submission of an expedited appeal to the Fifth Circuit, Ms. Leggett's six month incarceration was insufficient time for her to seek full review by this Court before the grand jury terminated. Her situation only demonstrates how the government's theory on mootness would arguably allow them to dictate whether or not Ms. Leggett's case and others ever receive full appellate review.

Ms. Leggett would have similarly little control over the time afforded her for judicial review if she were subpoenaed and held in contempt before the trial court. This Court has also recognized that due to the short duration of criminal trials, there remains the possibility that trial specific orders will evade review, or at least

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[4] This is due to the state prosecution of Robert Angleton on similar charges and the sharing of information between the state and the federal government in their investigations.

plenary review, of the Supreme Court. *Richmond Newspaper, Inc. v. Virginia*, 448 U.S. 555, 563 (1980) (Challenge by media to a court order that excluded public from a trial was not mooted by acquittal of defendant due to the short term nature of criminal trials). If Ms. Leggett's instant appeal were found moot under the government's theory, she could potentially return to custody before and during the criminal trial while trying to obtain full appellate review – only to have her case mooted again due to the conclusion of the trial.

Ms. Leggett's case is clearly one that fits the "capable of repetition but evading review" exception to the mootness doctrine. While the government makes an unpersuasive attempt to disregard her First Amendment claims, it makes no attempt to claim mootness on her Fifth Amendment privilege.[5] Both issues deserve this court's attention and review.

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[5] Instead the government argues that Ms. Leggett's Fifth Amendment claim of privilege does not warrant this Court's review. In doing so, they cite *United States v. Johnston*, 268 U.S. 220, 226 (1925), a case that is factually inapposite and where they direct the court's attention to a page where the court actually granted certiorari.

CONCLUSION

Wherefore the petitioner prays that this Court grant the petition for writ of certiorari as to this cause.

Respectfully submitted,

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AFFDIAVIT

AFFIDAVIT

BEFORE ME the undersigned authority personally appeared George Michael DeGeurin who after being duly sworn deposed and said:

> My name is George Michael DeGeurin. I am the attorney of record for Vanessa Leggett. The target of the grand jury investigation when Vanessa Leggett was subpoenaed to testify before the Grand Jury was Robert Angelton. When the term of that Grand Jury expired Vanessa Leggett was released from custody. Shortly after Vanessa Leggett's release from custody a new Grand Jury indicted Mr. Robert Angelton. The assistant U.S. attorney assigned the prosecution of Mr. Robert Angleton notified me that Vanessa Leggett would be subpoenaed again, this time as a witness for the trial of Robert Angelton. I was further informed that Vanessa Leggett is included in the government's witness list for trial that will be provided to Robert Angleton's defense attorney.

/s/ George Michael DeGeurin
George Michael DeGeurin

SUBSCRIBED TO before me, the undersigned authority on this the 20th day of March, 2002.

[SEAL] BLANCA LUJAN
MY COMMISSION EXPIRES
July 24, 2002

/s/ Blanca Lujan
Notary Public for the
State of Texas

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE GRAND JURY	§	
SUBPOENA TO	§	MISCELLANEOUS
VANESSA LEGGETT	§	NO. 01-179
	§	

UNITED STATES' RESPONSE TO MOTION TO VACATE CONTEMPT ORDER AND FOR ORDER OF IMMEDIATE RELEASE

The United States of America, through Michael T. Shelby, United States Attorney for the Southern District of Texas, responds to VANESSA LEGGETT's Motion to Vacate Contempt Order and for Order of Immediate Release, as follows:

1. On July 19, 2001, VANESSA LEGGETT appeared before Federal Grand Jury 00-01 and refused to comply with a grand jury subpoena requiring her to turn over tapes of interviews she admitted that she conducted with others in the investigation of Robert Angleton. Specifically, LEGGETT refused to respond to questions relating to her creation and or possession of tape recorded conversations, both video and audio, of 34 named individuals.

2. The district court conducted a hearing and LEGGETT again refused to comply with the grand jury subpoena citing her Journalist's privilege under the First Amendment. The district court cited LEGGETT for contempt under Title 28, United States Code, Section 1826(a). The court denied her motion for rehearing. On July 20,

2001, LEGGETT surrendered to the custody of the United States Marshal.

3. On August 17, 2001, the United States Court of Appeals for the Fifth Circuit recognized that no circuit court in this country has recognized a qualified testimonial privilege in the context of a federal criminal grand jury. The Fifth Circuit affirmed the district court finding that the court did not abuse its discretion in ordering LEGGETT incarcerated for contempt. The Fifth Circuit concluded that in criminal grand jury matters the public's interest in effective law enforcement virtually always outweighs the press's privilege against disclosing confidential sources or information.

4. Subsequently, LEGGETT exhausted her right of appeal before the Fifth Circuit when her motions for bond and rehearing en banc were denied.

5. As a matter of law, Rule 6(g) Federal Rules of Criminal Procedure, Grand Jury 00-01 cannot be extended beyond January 4, 2002. Therefore, VANESSA LEGGETT must be released by the court on that date and the court need not act on LEGGETT's motion for this to occur.

6. No citizen has the right to withhold evidence from a criminal grand jury. She continues to refuse to comply with the grand jury subpoena and with the order of the district court.

7. The United States intends to renew its request of LEGGETT to provide the previously requested material and will pursue available procedures to require LEGGETT's cooperation, if necessary.

Respectfully submitted,

MICHAEL T. SHELBY
United States Attorney

TERRY CLARK
EDWARD F. GALLAGHER III
Assistant United States Attorneys

CERTIFICATE OF SERVICE

I certify that a copy of United States' Response to Vanessa Leggett's Motion to Vacate Contempt Order and for Order of Immediate Release was sent to her counsel, Mike DeGuerin, by facsmile [sic] on January 3, 2002.

TERRY CLARK
Assistant United States Attorney

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE GRAND JURY	§	
SUBPOENA TO	§	MISCELLANEOUS
VANESSA LEGGETT	§	NO. 01-179
	§	

ORDER

Based upon the termination of service for Grand Jury 00-01, effective January 4, 2002, this Court has no choice but to order the Federal Detention Center in Houston to release VANESSA LEGGETT on January 4, 2002, no later than _____ a.m./p.m.

Signed January ___, 2002.

MELINDA HARMON
United States District Judge